Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24-440-1994
ABDUL MALIK ISHAK J
2 AUGUST 1995

Civil Procedure *— Stay of execution of judgment — Application for — Whether an appeal operates as a ground for stay — Whether possibility of dissipation of large sum of money amounts to special circumstance — Courts of Judicature Act 1964 s 73 — Rules of the Court of Appeal 1994 r 13*

The applicant applied for a stay of execution of the order made by the trial judge pending the disposal of her appeal to the Court of Appeal. The order concerned a land acquisition award of RM25,892,000 ('the award') which the land administrator had deposited in court vide an ex parte order dated 24 May 1995. By a vesting order made by the judge, the award was vested in the first defendant. The applicant feared that the first defendant would dissipate the award once it was released to him and applied for a stay of the order.

Held, dismissing the application:

(1) It is trite law that an appeal does not operate automatically as a stay of execution. Section 73 of the Courts of Judicature Act 1964 and r 13 of the Rules of the Court of Appeal 1994 give the judge a judicial discretion which must be exercised within the confines of the law.

(2) The court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it. What may amount to special circumstances is a question of fact in each case. It must be something distinctive and out of the way. An appeal to the Court of Appeal and the fact that a large amount of money is involved do not constitute special circumstances.

(3) The applicant had failed to establish by affidavit evidence that the first defendant was insolvent and therefore would not be in a position to reimburse the award and to pay damages in the event that the applicant were to succeed in her appeal.

[Bahasa Malaysia summary

Pemohon telah memohon untuk penggantungan pelaksanaan perintah yang diberikan oleh hakim perbicaraan sementara menunggu penyelesaian rayuannya kepada Mahkamah Rayuan. Perintah tersebut

melibatkan award pengambilan tanah sebanyak RM25,892,000 ('award itu') di mana pentadbir tanah telah membayar award itu ke mahkamah melalui satu perintah ex parte bertarikh 24 Mei 1995. Menurut perintah letakhak yang diberi oleh hakim, award itu telah diletakhakkan kepada defendan pertama. Pemohon bimbang bahawa defendan pertama akan melesapkan award itu sekiranya award itu dibayar kepadanya dan telah memohon untuk penggantungan perintah itu.

Diputuskan, menolak permohonan itu:

(1) Adalah menjadi undang-undang mantap bahawa sesuatu rayuan tidak berfungsi secara automatik sebagai suatu penggantungan pelaksanaan. Seksyen 73 Akta Mahkamah Kehakiman 1964 dan k 13 Kaedah-Kaedah Mahkamah Rayuan 1994 memberi kepada hakim satu budi bicara yang perlu digunakan mengikut had batasan undang-undang.

(2) Mahkamah tidak akan melucutkan hasil litigasi daripada sesuatu pihak yang berjaya sehingga satu rayuan telah diputuskan, melainkan jika pihak yang gagal boleh menunjukkan keadaan khas yang dapat memberikan alasan yang menjustifikasinya. Apa yang menjadi keadaan khas adalah persoalan fakta di dalam setiap kes. Ia mestilah sesuatu yang tersendiri dan luar biasa. Rayuan kepada Mahkamah Rayuan dan hakikat bahawa jumlah wang yang besar terlibat tidak merupakan keadaan khas.

(3) Pemohon telah gagal untuk membuktikan melalui keterangan afidavit bahawa defendan pertama adalah tidak solven di mana beliau tidak akan dapat membayar balik RM25,892,000 dan membayar ganti rugi sekiranya pemohon berjaya dalam rayuannya.]

[*Editorial Note*: For related proceedings, see [1995] 3 MLJ 6.]

Notes

For cases on stay of execution of judgement, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 668–671, 1359–1361, 3120–3125.

Cases referred to

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287 (folld)

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (folld)

Annot Lyle, The (1886) 11 PD 114 (folld)

Development & Commercial Bank Bhd v Che Wan Development Sdn Bhd & Ors [1990] 1 MLJ 12 (refd)

Eng Yam Construction Sdn Bhd v TAP Properties Sdn Bhd 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1363 (folld)

Hong Leong Finance Bhd v Hon Hoi Weng & Ors [1987] 2 MLJ 377 (folld)
Kong Thai Sawmill (Miri) Sdn Bhd, Re [1976] 1 MLJ 131 (folld)
Matang Holdings Bhd & Ors v Dato' Lee San Choon & Ors [1985] 2 MLJ 406 (folld)
Monk v Bartram [1891] 1 QB 346 (folld)
Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332 (folld)
Serangoon Garden Estate Ltd v Ang Keng [1953] MLJ 116 (folld)
Sungai Way Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors [1990] 1 MLJ 245 (folld)
Syarikat Berpakat v Lim Kai Kok [1983] 1 MLJ 406 (folld)

Legislation referred to

Land Acquisition Act 1960 s 29
Courts of Judicature Act 1964 s 73
Rules of the Court of Appeal 1994 r 13

Robert Lazar (*Rosita Yeo* with him) (*Yeo & Co*) for the applicant.
Wong Kim Fatt (*Christina LE Chia* with him) (*Christina Chia Ng & Partners*) for the first defendant.

Abdul Malik Ishak J: This was an application for a stay of execution of the order made by me on 12 June 1995 pending the disposal of the appeal to the Court of Appeal. In monetary terms, this case chalked up a figure of RM25,892,000 being the acquisition award which the land administrator had to deposit in court vide an ex parte order dated 24 May 1995, a move sanctioned by s 29 of the Land Acquisition Act 1960. By a vesting order made by me, the colossal figure of RM25,892,000 was vested in Raja Zainal Abidin and this was the sore point which brought about this application.

Mdm Wu Shu Chen, the sole executrix of the estate of Goh Keng How, affirmed an affidavit on 8 July 1995 and there, inter alia, she voiced her fear that Raja Zainal Abidin will dissipate that sum once that sum was released to him. Mr Robert Lazar, the learned counsel for the applicant, pointed out that the appeal was filed on 15 June 1995 and he drew my attention to the merits of the appeal and the special circumstances that ought to warrant a stay.

It is now trite that an appeal does not operate automatically as a stay of execution. This is clearly borne out by both s 73 of the Courts of Judicature Act 1964 and r 13 of the Rules of the Court of Appeal 1994. Section 73 of the Courts of Judicature Act 1964 provides that:

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

Rule 13 of the Rules of the Court of Appeal 1994 provides that:

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

The above quoted provisions give a leeway for me to exercise my judicial discretion and that discretion must be exercised within the confines of the law. A concerted attempt was made to show the incorrectness of my decision but this surely, with respect, cannot be construed as a special circumstance. Put in another way, the allegations that there have been misdirections in the judgment, that the judgment was against the weight of the evidence or that there was no evidence to support the judgment as advanced by Mr Robert Lazar, are not special circumstances on which this court will grant a stay (*Re Kong Thai Sawmill (Miri) Sdn Bhd* [1976] 1 MLJ 131). Even an appeal to the Court of Appeal as contemplated by the applicant cannot constitute a special circumstance; what amounts to special circumstances must be something distinctive and out of the way (*Matang Holdings Bhd & Ors v Dato' Lee San Choon & Ors* [1985] 2 MLJ 406). In the final analysis, what may amount to special circumstances is certainly a question of fact and it varies from case to case. Lord Esher MR aptly said in *Monk v Bartram* [1891] 1 QB 346 that:

> It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which the court will grant a stay of execution.

It was said that the position here was highly volatile. There was no certainty that RM25,892,000 would not be dissipated and this point must be taken into consideration and viewed against the prejudice that might be sustained by Raja Zainal Abidin if the stay was granted (*Development & Commercial Bank Bhd v Che Wan Development Sdn Bhd & Ors* [1990] 1 MLJ 12). By affidavit evidence in encl 45, Raja Zainal Abidin deposed as to his financial standing and certain details were revealed. All in all, Raja Zainal Abidin established himself as a man of considerable means with substantial assets. The applicant did not challenge the financial standing of Raja Zainal Abidin and neither did the applicant say in her affidavit in encl 41 that Raja Zainal Abidin was a man of straw. The failure of the applicant to contradict what was deposed to by Raja Zainal Abidin must now be considered to be an admission of the fact that was asserted (*Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332; and *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287). At any rate, Ms Christina LE Chia who argued for Raja Zainal Abidin was perfectly right when she submitted that the dissipation of RM25,892,000 in the event the applicant and the second defendant were to win the appeal was not a requirement for the stay. In *Eng Yam*

Construction Sdn Bhd v TAP Properties Sdn Bhd digested in 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1363, the applicant there alleged that the award involved a large sum of money and that if such sum was paid to the respondent, the applicant might not be able to recover it in the event that the action was successful. Abdul Hamid J in dismissing the application held, inter alia, that the fact that a large amount of money was involved did not constitute special circumstances.

Mr Wong Kim Fatt, the learned counsel for Raja Zainal Abidin, hit the point when he forcefully submitted that the affidavit of the applicant in encl 41 did not advert to credible or concrete evidence of dissipation of RM25,892,000 in the event that sum was held by Raja Zainal Abidin. The allegation of dissipation of assets was a mere speculation and that cannot be special circumstances, so submitted Mr Wong Kim Fatt. He next argued that to lock up the money which Raja Zainal Abidin was entitled to must surely be a grave prejudice and, consequently, the stay ought not to be granted. I venture to say that the applicant failed to establish by affidavit evidence that Raja Zainal Abidin is insolvent and therefore would not be in a position to reimburse RM25,892,000 and to pay damages in the event the applicant succeeds in her appeal. Unless evidence is adduced to the contrary, I must assume that Raja Zainal Abidin is not insolvent and this assumption is clearly borned out by his affidavit in encl 45. The general proposition that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it, must be vigorously applied to Raja Zainal Abidin (*Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116; *The Annot Lyle* (1886) 11 PD 114; and *Syarikat Berpakat v Lim Kai Kok* [1983] 1 MLJ 406). I must say with alacrity that the judgment which I gave on 1 June 1995 was arrived at after anxiously deliberating the lengthy submissions, both oral and written by both parties, and certainly that decision was not made summarily. All the points advanced by both parties were painstakingly considered by me as reflected in the written judgments which have been circulated to all the parties and when seen in this perspective Raja Zainal Abidin ought not to be deprived of the fruits of his litigation (*Hong Leong Finance Bhd v Hon Hoi Weng & Ors* [1987] 2 MLJ 377; *Sungai Way Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1990] 1 MLJ 245). For the aforesaid reasons, I dismissed encl 43 with costs.

Application dismissed.

Reported by Anne Khoo